

A Mohd Noor bin Setapa v Nik Hafizi bin Wan Mamat & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8-22-73 OF
2006
B AZAHAR MOHAMED J
17 MAY 2010

C *Companies and Corporations — Shares — Ownership of shares — Trust — Shares in second defendant company issued 30% to plaintiff and 70% to first defendant — Whether shares meant to be held on 50:50 basis — Whether first defendant held 20% of shares in trust for plaintiff — Whether there was written declaration of trust — Whether trust of shares recognised by memorandum and articles of association of second defendant — Whether trust over 20% of shares proven by plaintiff on balance of probabilities*

E *Companies and Corporations — Shares — Transfer of shares — Whether transfer of shares valid — Whether transferor misled to sign transfer form — Whether transfer of shares done voluntarily*

F *Companies and Corporations — Shares — Trust — Shares in second defendant company issued 30% to plaintiff and 70% to first defendant — Whether shares to be held on 50:50 basis — Whether first defendant held 20% of shares in trust for plaintiff — Whether there was written declaration of trust — Whether trust of shares recognised by memorandum and articles of association of second defendant — Whether trust over 20% of shares proven by plaintiff on balance of probabilities*

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H *Trusts and Trustees — Trustees — Creation of trust — Whether first defendant held 20% of company shares in trust for plaintiff — Whether there was written declaration of trust — Whether trust of shares recognised by memorandum and articles of association of second defendant — Whether trust over 20% of shares proven by plaintiff on balance of probabilities*

I The second defendant company was incorporated with an initial paid up capital of RM2 divided into two ordinary shares of RM1 each. The plaintiff and the first defendant were the initial shareholders and directors of the second defendant. Subsequently, on 5 April 2001, the paid up capital of the second defendant was increased to 999,998 with the first defendant holding 700,000 shares (70%) and the plaintiff holding 300,000 shares (30%). Thereafter, the plaintiff transferred his 30% shares to his brother ('PW2').

PW2 also replaced the plaintiff as a director of the second defendant. By an agreement dated 7 December 2004, the first defendant's 70% shares were sold to third parties. At that point of time PW2 agreed to sell his 30% shares in the second defendant to the first defendant. Accordingly, PW2 also resigned as a director of the second defendant. The plaintiff claimed that he had earlier paid RM1,000,000 as the paid up capital of the second defendant. According to the plaintiff, it was agreed between them that out of the 70% held by the first defendant, the first defendant would hold 20% as nominee/trustee for the plaintiff. The plaintiff claimed that he had transferred 30% of his shares to PW2, to be held as nominee and trustee. It was the plaintiff's contention that PW2 was tricked into transferring the said 300,000 shares in the second defendant company to the first defendant, which rightfully belonged to the plaintiff as beneficiary. The plaintiff claimed that he was entitled to 50% of the second defendant company and that the defendant had deprived him of his interest in the second defendant company. According to the first defendant the plaintiff advanced the paid up capital of RM1,000,000 on 8 January 2002 in the form of ten fixed deposit (FD) receipts. However, the paid up capital of RM1,000,000 was withdrawn within nine days by the plaintiff on 17 January 2002 and on 7 February 2002 without the approval of the first and second defendants. No resolution was passed to cancel the paid up capital. In this action, the plaintiff claimed, among others: (a) an injunction to restrain the first defendant from disposing of the plaintiff's 50% share equity in the second defendant company; (b) an injunction to prevent the disposing of the assets of the second defendant; and (c) a declaration that the plaintiff was beneficially entitled to 50% of the equity of the second defendant company.

Held, dismissing the claims with costs:

- (1) There was an agreement between the parties to the effect that the first defendant did not have to pay any money for the shares in the second defendant as he had nurtured his earlier company, Metro Bina and that its goodwill was used for the business of the second defendant (see para 51).
- (2) On 8 January 2002, RM1,000,000 was placed in FD receipts as paid up capital in the name of the second defendant but it was withdrawn within nine days without the knowledge of the first defendant. Thus, the monies were not paid when Form 24 was submitted (see para 52).
- (3) The shareholding in the proportion of 70% for the first defendant and 30% for the plaintiff was agreed by both parties well before the monies were paid on 8 January 2004. There was no evidence that the shareholding was to be on the ratio of 50:50 upon incorporation other

- A than the nominal RM2 paid on 4 April 2001, which is a normal practice for a RM2 company to issue nominal share of one unit for each director (see para 53).
- B (4) Based on the evidence, the plaintiff failed to prove on the balance of probabilities that there was an arrangement that the first defendant would hold 70% equity in the second defendant of which 20% to be held as nominees on behalf of and on trust for the plaintiff. The first defendant was not a trustee for the plaintiff in respect of the 20% shares (see paras 57–58).
- C (5) There was no written declaration or existence of trust between the plaintiff and PW2. PW2 did not even know what was the objective when he was appointed as a director and to take care of the plaintiff's share as alleged by him. Further, article 6 of memorandum and articles of association of the second defendant provided that trusts were not recognised. Based on the evidence, there was no intention to create a trust and there was no declaration or notice given by the plaintiff to the first defendant, (as the managing director) that PW2 held 30% shares in trust for him (see paras 64 & 67–68).
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- E (6) The first defendant was a trustworthy and credible witness. His evidence was consistent and fitted in the rest of the evidence. The court was more inclined to accept his version rather than the plaintiff and PW2 (see para 78).
- F (7) The pleaded case of the plaintiff that PW2 was misled to sign the transfer form was highly improbable. PW2 had voluntarily sold the 30% shares registered under his name to the first defendant. The first defendant had acted in good faith to purchase PW2's 30% shares and subsequently disposed of 70% of his shares in the second defendant to the third parties (see paras 79–80 & 83).

G **[Bahasa Malaysia summary]**

- Syarikat defendan kedua ditubuhkan dengan modal berbayar RM2 yang dibahagikan kepada dua saham biasa bernilai RM1 setiap satu. Plaintiff dan defendan pertama merupakan pemegang saham dan pengarah awal defendan kedua. Seterusnya, pada 5 April 2001, modal berbayar defendan kedua bertambah kepada 999,998 dengan defendan pertama memegang 700,000 saham (70%) dan plaintiff memegang 300,000 saham (30%). Kemudiannya, plaintiff memindahkan 30% sahamnya kepada abangnya ('PW2'). PW2 juga menggantikan plaintiff sebagai pengarah defendan kedua. Melalui perjanjian bertarikh 7 Disember 2004, saham defendan pertama dijual kepada pihak ketiga. Pada masa itu, PW2 bersetuju untuk menjual 30% sahamnya dalam defendan kedua kepada defendan pertama. Maka, PW2 meletak jawatan sebagai pengarah defendan kedua. Plaintiff mendakwa bahawa dia telah membayar RM1,000,000 modal berbayar kepada defendan kedua. Menurut
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plaintif, adalah dipersetujui di antara mereka bahawa daripada 70% yang dipegang oleh defendan pertama, defendan pertama akan memegang 20% sebagai penama/pemegang amanah bagi pihak plaintif. Plaintif mendakwa bahawa dia telah memindahkan 30% sahamnya kepada PW2, dipegang sebagai penama dan pemegang amanah. Adalah menjadi hujah plaintif bahawa PW2 ditipu untuk memindahkan saham 300,000 dalam defendan kedua kepada defendan pertama, yang mana secara sahnyanya dimiliki oleh plaintif sebagai benefisiari. Plaintif mendakwa dia berhak ke atas 50% daripada syarikat defendan kedua dan bahawa defendan telah menafikan kepentingannya dalam syarikat defendan kedua. Menurut defendan pertama, plaintif menyerahkan modal berbayar sebanyak RM1,000,000 pada 8 Januari 2002 dalam bentuk penerimaan sepuluh deposit tetap. Walau bagaimanapun, modal berbayar RM1,000,000 dikeluarkan dalam masa sembilan hari oleh plaintif pada 17 Januari 2002 dan pada 7 Februari 2002 tanpa kebenaran defendan pertama dan kedua. Tiada resolusi yang diluluskan untuk membatalkan modal berbayar tersebut. Dalam tindakan ini, plaintif mendakwa, antara lain: (a) injunksi untuk menghalang defendan pertama daripada melepaskan 50% saham ekuiti dalam syarikat defendan kedua; (b) injunksi untuk menghalang pelepasan aset-aset defendan kedua; dan (c) perisytiharan bahawa plaintif berhak secara benefisial ke atas 50% ekuiti syarikat defendan kedua.

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Diputuskan, menolak tuntutan dengan kos:

- (1) Terdapat perjanjian antara pihak-pihak yang menyatakan bahawa defendan pertama tidak perlu membayar wang bagi saham-saham dalam defendan kedua kerana dia yang memupuk syarikat terdahulunya, Metro Bina dan nama baik syarikat itu digunakan dalam perniagaan defendan kedua (lihat perenggan 51).
- (2) Pada 8 Januari 2002, RM1,000,000 dimasukkan dalam penerimaan deposit tetap sebagai modal berbayar atas nama defendan kedua tetapi dikeluarkan dalam masa sembilan hari tanpa pengetahuan defendan pertama. Oleh itu, wang tersebut tidak dibayar apabila Borang 24 dihantar serah (lihat perenggan 52).
- (3) Pegangan saham dalam bahagian 70% kepada defendan pertama dan 30% kepada plaintif adalah dipersetujui oleh kedua-dua pihak sebelum wang tersebut dibayar pada 8 Januari 2004. Tiada keterangan menunjukkan bahawa pegangan saham tersebut harus dalam nisbah 50:50 apabila syarikat ditubuhkan selain daripada nominal sebanyak RM2 yang dibayar pada 4 April 2001, yang mana merupakan amalan biasa bagi syarikat RM2 untuk mengeluarkan saham nominal satu unit kepada setiap pengarah (lihat perenggan 53).
- (4) Berdasarkan keterangan, plaintif gagal membuktikan atas imbalan kebarangkalian bahawa terdapat suatu perjanjian bahawa defendan

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- A** pertama memegang 70% ekuiti dalam defendan kedua yang mana 20% dipegang sebagai penama bagi pihak dan sebagai pemegang amanah plaintif. Defendan pertama bukanlah pemegang amanah plaintif bagi 20% saham tersebut (lihat perenggan 57–58).
- B** (5) Tiada perisytiharan bertulis atau kewujudan amanah antara plaintif dan PW2. PW2 tidak tahu apakah objektifnya apabila dia dilantik sebagai pengarah dan untuk menjaga saham plaintif seperti yang didakwanya. Selanjutnya, perkara 6 memorandum dan tataurusan syarikat defendan kedua memperuntukkan bahawa amanah tersebut tidak diiktiraf.
- C** Berdasarkan keterangan, tiada niat untuk membuat suatu amanah dan tiada perisytiharan atau notis diberikan oleh plaintif kepada defendan pertama, (sebagai pengarah urusan) bahawa PW2 memegang 30% saham sebagai amanah bagi pihaknya (lihat perenggan 64 & 67–68).
- D** (6) Defendan pertama merupakan saksi yang boleh dipercayai dan diharap. Keterangan plaintif adalah konsisten dan berpadanan dengan keseluruhan keterangan. Mahkamah cenderung untuk menerima versinya daripada versi plaintif dan PW2 (lihat perenggan 78).
- E** (7) Plaintif memplidkan kesnya bahawa PW2 dikelirukan untuk menandatangani borang pindah milik tersebut amatlah tidak berkemungkinan. PW2 secara sukarela telah menjual 30% saham yang didaftarkan atas namanya kepada defendan pertama. Defendan pertama telah bertindak dengan suci hati untuk membeli 30% saham PW2 dan kemudiannya menjual 70% sahamnya dalam defendan kedua kepada pihak ketiga (lihat perenggan 79–80 & 83).]
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Notes

For cases on ownership of shares, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 851–858.

- G** For cases on transfer of shares, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 897–923.

For cases on trust, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 924–926.

- H** For cases on trustees in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2511–2589.

Cases referred to

Cheong Yuk Wai & Anor v Low Sai Wee & Ors [2007] 2 MLJ 634, HC (refd)

Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & Ors [1991] 1 CLJ 343, HC (refd)

- I** *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd [2006] 4 MLJ 189, CA (refd)

- Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750, CA (refd) A
- Rahaz Sdn Bhd v Fasten Group Ltd & Ors and other appeals* [2010] 1 MLJ 69; [2009] 6 AMR 516, CA (refd)
- Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, FC (refd) B

Legislation referred to

Companies Act 1965 ss 163(1), (2), (3), (4)

- JS Gill (Abdul Razak Ismail with him) (Hisham Chong & Co) for the plaintiff. Tuan Zubaidah bt Tuan Muda (Nik Saghir & Ismail) for the first defendant. G Thangaraj (Thangaraj & Associates) for the second defendant.* C

Azahar Mohamed J:

[1] The dispute in this action revolves around the disagreement between Mohd Noor bin Setapa ('the plaintiff') and Nik Hafizi bin Wan Mamat ('the first defendant') pertaining to the allotment of the shares in Metro Bina Resources Sdn Bhd ('the second defendant'). In a gist, the plaintiff claims that he holds 50% equity in the second defendant. D

[2] In this action, the plaintiff is claiming, among others, for the following: E

- (a) an injunction to restrain the first defendant or his nominees from selling, transferring, disposing off or otherwise dealing in the plaintiff's 50% share equity in the second defendant company; F
- (b) an injunction to restrain the second defendant company and its board of directors, servants and agent from doing the following acts or any of them that is to say:
 - (i) transferring, disposing of or otherwise dealing with the plaintiff's 50% equity in the second defendant company or doing any act to dilute the plaintiff's interest in the second defendant company including the approving of any transfer of disposal of the plaintiff's 50% equity in the second defendant company; G
 - (ii) transferring, disposing of or otherwise dealing with the assets of the second defendant company, in particular the said land held under HS(D) 30576 Lot No PT 34825 Mukim Batu, District of Gombak and retention sums held by the second defendant company in respect of construction contracts undertaken by the second defendant unless required to be paid out under the terms of the said construction contracts. H I

- A (c) a declaration that the plaintiff is beneficially entitled to the 50% of the equity of the second defendant company and such consequential orders as may be necessary deemed fit to have the said interest registered in the plaintiff's or his nominees names and to have the plaintiff and his nominees appointed to the board of directors of the second defendant company so as to enable the plaintiff to have sufficient representation on the board of director of the second defendant to reflect his interest therein;
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- C (d) an inquiry as to damages in respect of the various acts committed by the first and second defendants in depriving the plaintiff of his interest in the second defendant company and in the assets of the second defendant company, taking into account any payments made to the plaintiff and/or Ahmad Rafi other than payments of dividends or distributions and for payments to the plaintiff of all sums found due upon taking such inquiry with interest thereon;
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- E (e) the sum of RM500,000 from the first defendant with interest thereon at 8%pa from 8 January 2002 until date of payment or realisation towards repayment of monies advanced by the plaintiff on behalf of the first defendant for the paid up capital of the second defendant company.

THE BACKGROUND FACTS

- F [3] The second defendant is a private limited company incorporated on 4 April 2001 with an initial paid up capital of RM2 divided into two ordinary shares of RM1 each. The plaintiff and the first defendant were the initial shareholders and directors of the second defendant. Subsequently, on 5 April 2001, the paid up capital of the second defendant was increased to 999,998.
- G Consequently, as at 5 April 2001, the first defendant had 700,000 shares (70%) and the plaintiff had 300,000 shares (30%). Thereafter, the plaintiff transferred his 30% shares to his brother, Ahmad Rafi bin Setapa ('PW2') on 26 April 2001. At the same time, PW2 replaced the plaintiff as a director of the second defendant.
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- I [4] By a sale and purchase agreement to purchase shares dated 7 December 2004, the nominees of Ara Damansara Sdn Bhd ('ADSB') ie Zamzuri bin Mohd Shariff ('Zamzuri') and Md Shahir bin Alias ('Shahir') purchased 70% shares of the first defendant which were then registered under the first defendant (380,000 (38%)) and his wife, Zuraini bt Hashim (320,000 (32%)). ADSB had paid RM980,000 as consideration for the 70% shares. The sale and purchase agreement is tied with the joint venture agreement dated 7 December 2004 ('JV agreement') entered between the second defendant and ARSB.

[5] Then an important event happened. PW2 had agreed to sell his 30% shares in the second defendant to the first defendant for a consideration sum of RM980,000. There is a serious dispute about this transaction between parties, which formed one of the subject matter of the present action, where more will be said on a later stage of this judgment. PW2 had executed the share transfer form dated 7 December 2004 before Encik Azmi bin Jaafar (DW3) who is an advocate and solicitor. Accordingly, PW2 had also resigned as a director of the second defendant.

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[6] It is not disputed that the current registered shareholders and directors of the second defendant are as follows:

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Shareholder	Shares
(a) Zamzuri	380,000
(b) Shahir	320,000
(c) The first defendant	300,000

D

Directors

- (a) The first defendant
- (b) Zuraini
- (c) Zamzuri
- (d) Shahir
- (e) Ghazali bin Salleh

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[7] Before dealing with the specific issues, which arise for decision, I think it is useful to state briefly the rival contentions of the parties.

THE PLAINTIFF'S CASE

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[8] The plaintiff and the first defendant, prior to knowing one another, had their own individual business and experience in the field of construction. The plaintiff has had experience as a class A contractor and the first defendant as a class D contractor. When the parties met, they had discussions to do business together and venture into bigger projects.

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[9] The services of a secretarial firm Edaran Karisma Management & Consultancy Sdn Bhd (EKMCSB) were utilised to incorporate the second defendant.

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[10] The plaintiff paid RM1,000,000 to ensure that the paid up capital of the second defendant stands at RM1,000,000. As for the shareholding, the first defendant will hold 70% and the plaintiff will hold 30%. According to

A the plaintiff, it was agreed between them that out of the 70% held by the first defendant, the first defendant would hold 20% as nominee/trustee for the plaintiff. This was agreed to by instructing the second defendant to prepare a share transfer form. Subsequently, the plaintiff transferred 30% of his shares to PW2, to be held as nominee and trustee. The directors of the second
B defendant by April 2001 were the first defendant and PW2 and the plaintiff was appointed as chief operating officer of the second defendant.

C [11] Against this background, the plaintiff contends that he played a major role in securing projects for the second defendant. Nonetheless, disagreements surfaced along the way, in particular over the acquisition of a piece of land known as HS(D) 30576, Lot PT 34825, Mukim Daerah Gombak ('the said land').

D [12] Attempts were made by both parties to resolve the dispute by making offer and counter offers to one another in selling their interest in the second defendant.

E [13] The attempts failed and it was during this period that the plaintiff contends that the first defendant engineered a scheme into tricking PW2 into parting with the shares held by PW2.

F [14] According to the plaintiff, while the first defendant having absolute control of the second defendant, the former entered into a JVA with ADSB to develop the said land.

G [15] To date, the first defendant and his wife, Zuraini bt Hashim are the shareholders of the second defendant, with 30% of the total shares.

H [16] The plaintiff claims that the first defendant held 20% of the equity in the second defendant company amounting to 200,000 shares in the second defendant company as nominee on behalf of and on trust for the plaintiff. The plaintiff claims that the cancellation of the share transfer Form A executed by the first defendant in favor of the plaintiff for the aforesaid 200,000 shares in the second defendant, representing 20% of the equity of the second defendant company, on or about 25 February 2005 was invalid and as a result the plaintiff has been deprived of his interest in the second
I defendant company.

[17] The plaintiff also claims that PW2, held a further 300,000 shares in the second defendant company, representing 30% of the equity of the second defendant company, as nominee on behalf of and on trust for the plaintiff.

[18] It is the plaintiff's contention that PW2 was induced, deceived and tricked into transferring the previously mentioned 300,000 shares in the second defendant company to the first defendant, which rightfully belonged to the plaintiff as beneficiary, and as a result, the plaintiff has been further deprived of his interest in the second defendant company.

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[19] The plaintiff claims that he is entitled to 50% of the second defendant company and that the defendants have acted to deprive him of his interest in the second defendant company and in the assets of the second defendant company.

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[20] The plaintiff claims that the defendants' actions have also diminished the value of the second defendant company, thereby diminishing the value of the plaintiff's interest in the second defendant company.

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[21] The plaintiff claims the registration of shares in his name amounting to 50% of the equity in the second defendant company as well as equal representation on the board of directors of the second defendant company and he claims damages against the defendants. Lastly, the plaintiff claims the repayment of RM500,000 from the first defendant being the amount advanced on behalf of the first defendant for 500,000 shares in the second defendant company.

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THE FIRST DEFENDANT'S CASE

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[22] The first defendant founded Metro Bina in 1990 with a class C licence in civil construction with Pusat Khidmat Kontraktor ('PKK'). In mid 2000, all of a sudden the plaintiff approached the first defendant to venture into the first defendant's business and to expand the same.

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[23] The plaintiff and the first defendant agreed to form the second defendant by converting Metro Bina's PKK class C licence to class A licence on condition that the plaintiff would advance RM1,000,000 as paid up capital.

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[24] It was agreed for the plaintiff to advance RM1,000,000 as his contribution towards the paid up capital but the first defendant need not contribute to the paid up capital as the business of the second defendant originated from Metro Bina, which the first defendant had nurtured since 1990.

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[25] On 4 April 2001, the second defendant was formed with an initial paid up nominal equity of RM2 with one unit each for the first defendant

- A** and one unit for the plaintiff, wherein the first defendant and the plaintiff became directors. On 5 April 2001, the first defendant and the plaintiff raised the issued equity of the second defendant another 999,998 units to be divided into 699,999 units to the first defendant (70%) and 299,999 units to the plaintiff (30%).
- B**
- C** [26] As at 5 April 2001, the paid up capital of the second defendant has not been advanced or paid by the plaintiff although the Form 24 (return of the allotment of shares) were already issued for 700,000 (70%) equity in the first defendant's name with share certificates and for 300,000 (30%) equity in the plaintiff's name with share certificates.
- D** [27] It was agreed that the plaintiff might purchase 20% equity from the first defendant by paying RM200,000. In year 2002, the first defendant signed an undated Form 32A and agreed to transfer 20% equity to the plaintiff and an undated resolution of the second defendant was passed.
- E** [28] The plaintiff did not pay for the 20% equity. As such, the undated Form 32A was not effected for stamping and there were no share certificates issued in the plaintiff's name.
- F** [29] The plaintiff advanced the paid up capital of RM1,000,000 on 8 January 2002 in the form of ten fixed deposit (FD) receipts. The paid up capital of RM1,000,000 was withdrawn within nine days by the plaintiff on 17 January 2002 and on 7 February 2002 without the approval of the first and second defendants. No resolution was passed to cancel the paid up capital.
- G** [30] On 26 April 2002, the plaintiff transferred his 30% equity to his brother, PW2 and the plaintiff resigned as director. The plaintiff became an employee as the chief operation officer of the second defendant drawing a salary of RM5,000 per month.
- H** [31] The plaintiff proposed the second defendant to purchase the said land (referred earlier) vide sale and purchase agreement dated 13 June 2003 by payment of 10% deposit of RM560,000 and to sell part of it (50,000 sq ft) to PETRONAS. The plaintiff was entrusted with the negotiation for the purchase of the said land from Danaharta and for the sale of part of the said land as he claimed he knew some 'insiders' in PETRONAS.
- I** [32] After almost a year the plaintiff had given feedback to the first defendant that PETRONAS was no longer interested to purchase part of the said land but he had planned to have the said land to be transferred to himself as he had, prior to the receiving PETRONAS offer letter, proposed to the first

defendant that he should purchase the said land from the second defendant to lighten the second defendant's burden. A

[33] A quarrel arose on 9 July 2004 between the first defendant and the plaintiff over the plaintiff's concealment of PETRONAS offer letter dated 16 June 2004 to purchase 50,000 sq ft of the said land, which was faxed by Maybank Setapak to the second defendant on 7 July 2004 and which was subsequently brought to the attention of the first defendant. B

[34] The quarrel ended up with the first defendant's offer to purchase PW2's shares. The counter offers by the first defendant to purchase PW2's 30% equity through the plaintiff also did not materialise. C

[35] Later the first defendant agreed to purchase PW2's 30% equity when: D

- (a) PW2 signed the offer letter on 3 December 2004 accepting the offer;
- (b) PW2 resigned on 3 December 2004 as a director;
- (c) PW2 transferred the shares to the first defendant on 7 December 2004; E
- (d) PW2 accepted RM980,000 from the first defendant, at the office of Abraham & Ooi; and
- (e) PW2 signed a statutory declaration dated 31 December 2004 that he will not have any claim against the first or the second defendant. F

[36] The undated Form 32A to transfer the 20% shares to the plaintiff was cancelled on 25 February 2005 by the second defendant's board resolution at the EGM, as the first defendant did not receive any payment for RM200,000 from the plaintiff since 2002. G

[37] In the above premises, the first defendant contends that: H

- (a) the first defendant was not a trustee for the plaintiff in respect of the 20% equity (the undated Form 32A) in the first defendant name;
- (b) PW2 was not a trustee for the plaintiff in respect of the 30% equity in PW2's name;
- (c) the transfer of 30% equity from PW2 to the first defendant on 7 December 2006 was valid; I
- (d) there was no oral or written agreement between the plaintiff and first defendant to give the profits of the second defendant's sale of 50,000 sq ft land to PETRONAS to the plaintiff;

- A** (e) there was no oral or written agreement between the plaintiff and the first defendant of the third offer to purchase PW2's shares dated 26 April 2004;
- B** (f) there was no oral or written agreement between the plaintiff and the first defendant to transfer to the plaintiff's hotel platform shares which belong to the second defendant for free;
- (g) the plaintiff is neither a shareholder nor a director of the second defendant.

C THE SECOND DEFENDANT'S CASE

[38] The second defendant has a paid up capital of RM1,000,000 with the issuance of 1,000,000 ordinary shares of RM1 each.

- D** [39] ADSB entered into a JVA dated 7 December 2004 to develop the said land. Pursuant to the terms of the JVA agreement, 70% of the shares in the second defendant were transferred to the nominees of ARSB.

- E** [40] The first defendant still owns 30% of the shares in the second defendant after purchasing the shares from PW2. The dispute is between the plaintiff and the first defendant on the shareholding of the second defendant.

- F** [41] The plaintiff is not entitled to seek the injunctive relief which is sought in prayer 25(ii)(a) and (b) of the statement of claim as the company is a separate person from its shareholders and no shareholder has any right to any property owned by the company.

G FINDINGS OF THE COURT

- H** [42] Having stated the rival contention of the parties, in my view, there are two core questions to be decided in this action, namely (a) whether the first defendant was holding 20% shares in the second defendant in trust for the plaintiff and, (b) whether the transfer of 30% shares from PW2 to the first defendant is valid.

- I** [43] I have read in detail the testimonies of PW1, PW2, and DW1– DW8, the pleadings, the documentary exhibits and the submissions of all the parties. After much thought and deliberation, this is my judgment in respect of the core issues, which I shall deal with each of them in turn.

Whether the first defendant was holding 20% shares in the second defendant in trust for the plaintiff

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[44] In relation to this question, learned counsel for the plaintiff contends that the first defendant was holding the 20% for him. Learned counsel for the plaintiff has put great emphasis on the plaintiff's contribution towards the paid up capital and the fact that the first defendant had agreed that he did not contribute a single cent towards the paid up capital. According to learned counsel, Abdul Aziz bin Mohamed ('DW4'), the Managing Director EKMCSB stated that he dealt with the plaintiff although he knew that the plaintiff was a minority shareholder. It was argued that this give credence that DW4 accepted the fact that the 20% does not belong to the first defendant. According to learned counsel, DW4 must have known that the plaintiff was in control and could instruct DW4, as he wanted. Learned counsel further argued that given the circumstances that the plaintiff was to finance the paid up capital, the first defendant had agreed to this arrangement to hold the 20% share for the plaintiff. According to learned counsel, it is therefore not unreasonable for the plaintiff to demand an equal share. He submitted that there is no reason to doubt the plaintiff's testimony that the first defendant was holding the 20% for the plaintiff.

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[45] Now, the burden is on the plaintiff to prove his case on the balance of probabilities that the first defendant held 20% shares in trust for him.

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[46] The first defendant did not dispute that after the second defendant's incorporation, the paid up capital was increased to 999,998 from RM2 with 699,999 in his name and 299,999 for the plaintiff but it was agreed on condition that the plaintiff would advance RM1,000,00 as paid up capital. According to the first defendant, it was agreed that he need not pay any money for the 70% shares because Metro Bina's goodwill and record of accomplishment would be used to convert its class C licence to class A contractor licence. He further added that it was on this condition that he agreed the plaintiff to own 30% shares in the company. According to him, RM1m was supposed to be paid for the second defendant as paid up capital, whilst he applied for class A PKK licence using Metro Bina's goodwill and track record. The first defendant denied that RM500,000 was advanced on his behalf.

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[47] Now, in the first place, article 6 of the article of association of the second defendant provides that no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be required in any way to recognise (even when having notice thereof) any

A equitable, contingent, future or partial interest in any shares or any other right in respect of any share other than an absolute right to the entirety thereof in the registered holder.

B [48] At this point, it needs to be made clear that there is no written declaration of trust adduced by the plaintiff before this court.

C [49] On the contrary, there is evident based on the Form 24 (return of the allotment of shares) that the allocation of shares was in the proportion of 70% for the first defendant and 30% for the plaintiff. Indeed, the fact that the first defendant held 700,000 units in share certificates and the plaintiff held 300,000 units in shares certificates as at 5 April 2001 proved that they were not equal shareholders.

D [50] In my view the first defendant's Metro Bina goodwill and track record to convert its licence to PKK class A must be considered to measure the first defendant's contribution to his shares. Viewed in this light, it is my findings that the plaintiff did not advance RM500,000 for the first defendant's 70% share on 5 April 2001.

E [51] I accept the first defendant's evidence that in fact there was an agreement between the parties to the effect that he need not pay any money for the shares in the second defendant as he had nurtured Metro Bina and that its goodwill was used for the business. In this regard, the plaintiff agreed that Metro Bina's record of accomplishment was sufficient to register for class A licence. As it turned out, the second defendant was awarded a PKK class A contractor licence on 2 August 2001, about three months after it was incorporated on 4 May 2001 and way before RM1,000,000 was advanced by the plaintiff.

G [52] Regarding the contention that the plaintiff contributed to the RM1,000,000 paid up capital, a very important point to bear in mind is that it was only paid on 8 January 2002. It is evident that on 8 January 2002, RM1,000,000 was placed in FD receipts as paid up capital in the name of the second defendant but it was withdrawn within nine days without the knowledge of the first defendant. In this, it is relevant to note that the monies were not paid when the Form 24 was submitted.

H [53] I accept the evidence of the first defendant that the shareholding in the proportion of 70% for the first defendant and 30% for the plaintiff was agreed by both parties well before the monies were paid on 8 January 2004. There is no evidence that the shareholding was to be on the ratio of 50:50

upon incorporation other than the nominal RM2 paid on 4 April 2001, which is a normal practice for a RM2 company to issue nominal share of one unit for each director. A

[54] That is why I cannot accept the testimony of the plaintiff to the effect that the first defendant had agreed to hold 20% shares in the second defendant for the plaintiff. I give greater weight to the credibility of the first defendant rather than the plaintiff. B

[55] Further on this point, there was no common intention to create a trust when the undated transfer form was signed because it was intended for sale in consideration of RM200,000 that was not paid, as such it was not stamp and effected for stamping since 2002. C

[56] What is more, the new shareholders of the second defendants rightly convened and passed a resolution in cancelling the transfer form at an extra ordinary general meeting and in my view, the resolution to cancel the transfer form on 25 February 2005 was valid. D

[57] Therefore based on the evidence as presented before this court, it is my findings that the plaintiff has failed to prove on the balance of probabilities that there was an arrangement that the first defendant would hold 70% equity in the second defendant of which 20% to be held as nominees on behalf of and on trust for the plaintiff. E

[58] For all these reasons, it is my judgment that the first defendant was not a trustee for the plaintiff in respect of the 20% shares. F

[59] Next, I move on to deal with the second core question. G

Whether the transfer of 30% shares from PW2 to the first plaintiff is valid

[60] Before dealing with this core question, it is important to address the issue whether PW2 held the 30% shares in trust for the plaintiff. In this regard, the court has to consider the relationship between the plaintiff and PW2, who is his brother. It is obvious from the evidence that PW2 is not well educated and has very little business experience; he only did odd jobs in his hometown. According to the plaintiff the reasons for transferring his 30% shares to PW2 was due to his involvement with PETRONAS and to avoid a conflict of interest situation. H I

[61] Now, it is clear that as at 26 April 2002 the share certificates showed PW2 owned 300,000 units. There were no 30% shares in share certificates in

- A the name of the plaintiff as at 26 April 2002. I have noted earlier, on 5 April 2001 Form 24 showed that the first defendant held 70% shares and the plaintiff held 30% shares supported by share certificates.
- B [62] The plaintiff testified that he transferred the 30% shares held in his name to his brother, PW2 on or about 26 April 2002 as his nominee and trustee and at the same time he resigned as a director of the second defendant company.
- C [63] The document tendered in the course of the trial clearly showed that there was a transfer of 300,000 units of share for a consideration of RM300,000 and the financial statement ending 31 March 2003 signed by PW2 revealed the plaintiff's 300,000 units shares were sold to PW2.
- D [64] There is no written declaration or existence of trust between the plaintiff and PW2. In this regard, it is relevant to note that PW2 did not even know what was the objective when he was appointed as a director and to take care of the plaintiff's share as alleged by him. Further, the arrangement was not made known to the first defendant.
- E [65] In this regard, Mohd Yusoff Abdullah (DW2) said that PW2 was a director and a shareholder. He was not aware of how many shares PW2 had. Encik Aziz Abdullah (DW4) testified in that he did not know what was the reason why the plaintiff transferred his shares to PW2.
- F
- G [66] Evidently, when PW2 signed the letter of offer dated 3 December 2004, a transfer to the first defendant was executed; a consideration of RM980,000 was paid on 7 December 2004. Viewed in this light, to my mind, PW2's acceptance implied that there was no trust in existence between PW2 and the plaintiff. More will be said further on at a later stage on this aspect of the case.
- H [67] As stated earlier, article 6 of memorandum and articles of association of the second defendant provides that trust are not recognised and article 22 provides that the instrument of any share shall be executed by or on behalf of the transferor, and the transferor shall be deemed to remain the shareholder of share until the name of transferee is entered in the register of members in respect thereof.
- I [68] In view of all these, based on the available evidence adduced, there was no intention to create a trust and there was no declaration or notice given by the plaintiff to the first defendant, (as the managing director) that PW2 held 30% shares in trust for him.

[69] The plaintiff did not show evidence on balance of probabilities that PW2 held 30% in trust for him. On the contrary, the evidence points to this: the plaintiff has transferred 30% of his shares to his brother, PW2. The plaintiff was no longer the owner of those shares. This brings me to the second core question: whether the transfer of 30% shares from PW2 to the first defendant is valid.

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[70] Very broadly stated, the essence the plaintiff contention is that on 7 December 2004 the first defendant had induced, deceived or tricked PW2 to transfer the 30% equity held by him in the second defendant to the first defendant for payment of RM980,000 by misleading PW2 into believing that the payment was a distribution of profits of the second defendant. Furthermore, it is the contention of the plaintiff that the first defendant also misled PW2 into believing that the documents he signed were in respect of another company, Metro Bina Machinery Sdn Bhd. PW2 denied that the documents he signed were the form to transfer his shares in the second defendant to the first defendant and his resignation as director of the second defendant, PW2 further denied he had signed a statutory declaration to the effect that he would have no further claim against the first and second defendants.

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[71] That said, in my view, these serious allegations of misrepresentation, inducement and cheating must be tested against the following factual matrix:

- (a) the dates on the five documents alleged to be slipped were signed on different dates at different places;
- (b) the letter of offer and the resignations letters were signed on 3 December 2004 at the second defendant's office before DW2;
- (c) the transfer form dated 7 December 2004 was signed at M/S Abraham & Ooi witnessed by DW3;
- (d) the statutory declaration dated 31 December 2004 was signed before the commissioner of oaths;
- (e) there were no PKK and Metro Bina Machinery Sdn Bhd forms;
- (f) there was no evidence of payment of profits in the sum of RM980,000.

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[72] The fact that PW2 signed the letter of offer (exh D14) and willingly went to Messrs Abraham & Ooi to execute the transfer form (D17) and to receive the cashiers order, an inference may be drawn that he had acted on his own accord to sell and transfer his shares. The fact that he bank into his account and took a month to pay RM980,000 to the plaintiff showed that he was willing and able to sell and transfer his shares. The fact that both the plaintiff and the PW2 did not lodge a police report implied that everything

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A was done above board. Further, the sale of the 30% by PW2 and the negotiations for the sale of his shares all took place in 2004. There is no acceptable explanation for the delay in filing this action.

B [73] The plaintiff's evidence was based from what he heard from PW2 and not what he saw directly.

C [74] In my view, PW2 understood what went on when he signed the letter of offer on 3 December 2004 in Bahasa Malaysia and transfer form witnessed by a solicitor on 7 December 2004 and received the payment of RM980,000 at the offices of M/s Abraham & Ooi.

D [75] The first defendant in his evidence had said that the plaintiff concealed a PETRONAS letter of offer to purchase 50,000 sq ft of the said land which strained their relationship leading to the negotiation of the sale of 30% shares held by PW2 vide three offers but did not materialise. Then, according to the first defendant, he offered PW2 to purchase his 30% shares, which was accepted by PW2 by signing the letter of offer. He further said that PW2 accepted RM980,000 from him and a transfer form was executed witnessed by DW3 at the office of M/s Abraham & Ooi. In his testimony, the first defendant said he went through financial difficulties. Elaborating on this, the first defendant said he obtained financial assistance from a developer, ADSB by going into a JVA and sold his and wife's 70% shares to the nominees of the developer and became a minority shareholder (30%) until today.

G [76] To my mind, there is internal consistency in the evidence of the first defendant. The first defendant had to enter into the JV agreement and the sale and purchase agreement to raise RM840,000 to pay the difference between the loan sum and balance purchase price for the said land. It was critical that the second defendant had to pay RM840,000 by 8 December 2004 failing which the sale and purchase agreement to purchase the land would be terminated and the deposit forfeited. In such an event, the value of the shares of the second defendant would be substantially reduced.

H [77] Knowing the critical situation, in my view, PW2 had agreed to sell his shares for a sum of RM980,000 and had executed the sale and purchase agreement for shares before DW3 on 7 December 2004. On the same day, PW2 had collected the bank drafts for RM980,000. In fact, PW2 admitted during cross-examination that he had received the bank drafts at the first defendant's solicitor's office.

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[78] It is for all these reasons that I find that first defendant is a trustworthy and credible witness. His evidence is consistent and fits in the rest of the evidence. I am more inclined to accept his version rather than the plaintiff and PW2. A

[79] In addition, it is my findings that DW3 is an independent and truthful witness. In light of the evidence of the first defendant which is corroborated by the evidence of DW3, it is my findings that the pleaded case of the plaintiff that PW2 was misled to sign the transfer form is highly improbable. From the contemporaneous documents, it is evident that PW2 had executed the transfer form at the firm of M/s Abraham Ooi & Partners in the presence of DW3. B
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[80] From the totality of the evidence before this court, it is my findings that PW2 had voluntarily sold the 30% shares registered under his name to the first defendant. D

[81] On the other hand, it is my findings that the plaintiff's version that the first defendant had induced, deceived or tricked PW2 to transfer the 30% equity held by PW2 in the second defendant to the first defendant for payment of RM980,000 by misleading PW2 into believing the payment was a distribution of profits is wholly not credible and I reject it. E

[82] The transfer dated 7 December 2004 was valid and binding and that PW2 was paid for the shares. F

[83] It is my findings that the first defendant had acted in good faith to purchase PW2's 30% shares and subsequently disposed of 70% of his shares in the second defendant to the nominees of ADSB.

[84] On all these grounds alone, the plaintiff's suit against the first defendant and the second defendant must be dismissed. G

[85] Still, I shall very briefly deal with the plaintiff's case against the second defendant. H

Whether the plaintiff has a valid claim against the second defendant

[86] In any event, it is my judgment that the plaintiff case against the second defendant is untenable. I

[87] The shares in the second defendant have been transferred to the respective shareholders and the current registered shareholders of the second defendant are:

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Shareholder	Shares
(a) Zamzuri	380,000
(b) Shahir	320,000
(c) The first defendant	300,000

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[88] The second defendant is entitled not to recognise any trust or equitable trust in the shares.

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[89] In the case of *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, which also involves shareholders dispute, the Federal Court had decided at p 242 that:

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The parties to all the transactions I have referred to in the matter of the monetary advances by way of loans to the first defendant by the respondent, the first defendant taking up shares in the appellant and the allocation of such shares in the appellant as were agreed to the respondent and Hiew Pau were throughout only the respondent, Hiew Pau and the first defendant. The appellant, which is an entirely distinct and separate juristic entity and personality, was not a party to any of these matters. In the matter of the acquisition of shares by the first defendant in the appellant, the former was allotted and is registered as the holder of 2,399,999 shares in the latter and the source of the funds for payment by the first defendant for these shares has nothing whatever to do with the appellant.

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The respondent can of course enforce his rights in respect of the loans he made to the first defendant and his claim to entitlement to shares in the appellant against the first defendant and perhaps Hiew Pau as well, and it would be open to them to bring in the appellant as a third party to any such proceedings if necessary and so advised. The respondent however has no privity whatsoever with the appellant in any of these transactions with any resulting right of direct enforcement by him against it, and the appellant owes no contractual or other obligation to him.

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A company does not take cognisance of trusts except in so far as is provided for in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder. This goes beyond s 163 in so far as it relates not merely to the question of registration of the membership right but generally to the recognition of trusts in connection with shares. Now art 10 of the appellant's articles of association which goes beyond the provisions of s 163(4) of the Companies Act expressly stipulates that except as required by law, no person shall be recognised by it as holding any share upon any trust, and it shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in

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any share or unit of a share or (except only as by its articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder. The cestui que trust of shares in a company cannot be made liable either as a shareholder or as a contributory for there is no privity of contract between him and the company (*Cree v Somervail*

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(1879) 4 App Cas 648). In *Re Perkins, Ex parte Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 (at p 616), Lord Coleridge CJ said:

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In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register.

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It is therefore of no concern of or to the appellant whether or not the first defendant holds any of the 2,399,999 shares registered in its name in the appellant on trust for the respondent or any one else.

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[90] Likewise in the case of *Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & 4 Ors* [1991] 1 CLJ 343 at p 347 after referring to article 6 and s 163(4) of the Companies Act 1965, it was decided that:

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It is therefore no concern to the first defendant whether or not Yap Eng Seng has any equitable interest in the shares. So far as the first defendant is concerned the registered shareholders have the absolute right to the entirety in their shares. For the same reasons the plaintiff's claim that he owned beneficially 50% equity shareholding in the first defendant through the purchase of Yap Eng Seng a beneficial interest cannot hold good. The plaintiff's further claim that he owned beneficially 30% equity in Supermuda also for the same reasons cannot stand.

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The plaintiff's further allegation against Yap Eng Seng is that he caused the gaming licence granted to Supermuda to be issued by the Sabah Government to the third defendant. The allegation is that Supermuda had been wronged. Then, in such a case, the proper person to bring the action in respect of that wrong is Supermuda. The plaintiff is not entitled to bring an action in respect of the wrong done to Supermuda. The plaintiff's action is not a derivative action. Then he alleges that the sale of the third defendant to the fourth defendant was without his knowledge and approval. I find there was no need for his approval.

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I find the statement of claim only discloses a complaint against the second defendant and Yap Eng Seng. According to the allegations the unlawful acts were all committed by them. There is no allegation against the first, third, fourth and fifth defendants. The allegations against the second defendant and Yap Eng Seng do not implicate the other defendants.

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[91] In my judgment, the plaintiff's case does not fall under any of the exceptions under s 163(1)–(3) and therefore the second defendant is entitled not to recognise any trust or equitable trust in the shares.

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A [92] In the same way, in the case of *Cheong Yuk Wai & Anor v Low Sai Wee & Ors* [2007] 2 MLJ 634 the court had decided that by virtue of article 6 and s 163 of the Companies Act 1965, the third defendant who is a company secretary could not in law recognise any beneficial interest. At pp 666–668 it was decided that:

B By virtue of article 6 of the articles of association and s 163 of the Act, the third defendant could not in law recognise any beneficial interest as claimed by the plaintiffs on the following grounds:

C (a) the fourth defendant company does not recognise any beneficial interest where the same is not registered. Therefore, the third defendant, being the company secretary could not recognise such beneficial interest because the fourth defendant company did not recognise such interest;

D (b) the plaintiffs were neither the registered shareholders nor named directors of the fourth defendant company. Therefore, in law the third defendant clearly owes no duty to the plaintiffs. As such, there is no legal duty for the third defendant to comply with the instructions of the plaintiffs on 14 April 1998 or thereafter;

E (c) if the defendant had carried out the instructions of the plaintiffs, the third defendant would have in breach of her duty towards the fourth defendant company because at that time, as far as the company's records were concerned, the first, second and eighth defendants were still the named shareholders and directors;

F (d) at all material times, the third defendant had never received any mandate, notice or instruction from the named shareholders and directors of any trust arrangement or beneficial ownership to recognise the interests of the plaintiffs in the fourth defendant company. Likewise, the third defendant never had any prior knowledge of such trust arrangement or beneficial ownership in the fourth defendant company. The facts were never challenged by the plaintiffs;

G (e) at all materials times, the third defendant owed no legal duty to any party other than the fourth defendant company. A company secretary owes a duty to the company but not its shareholders (see *Percival v Wright* [1902] 2 Ch 423). Therefore, the contention that the third defendant has breached her duty to the plaintiffs who were not a registered shareholder or named director in the fourth defendant company is untenable;

H (f) Since a company cannot take cognisance of the interest of person who is not a registered shareholder, therefore, neither can be company secretary (see *In re Perkins; Ex parte Mexican Santa Barbara Mining Co* (1890) QBD Vol xxiv 613; *Kang Kok Kwang v Bukit Baru Centre Sdn Bhd & Ors* [1991] 1 CLJ 343; *Sundram Properties Sdn Bhd v Civil Wettasinghe @ Christie Wettasinghe & Ors* [1987] 1 CLJ 213; *Yeng Ying Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240; *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239; and *Lim Cheng Huat Raymond v Teoh Siang Teik* [1996] 3 SLR 605);

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- (g) In the *Perkins; Ex parte Mexican Santa Barbara Mining Co* (1890) QBD Vol xxiv 613, the English Court of Appeal held that:

In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's registrar as the holder of shares, the relations which he may have with some other person in respect of the shares are matters which the company have nothing whatever to do; they can look only to the man whose name is upon the register.

- (h) In *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, the Federal Court held (at p 242): A company does not take cognisance of trusts except in so far as is provided for in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder. As a whole, the plaintiffs have failed to establish or prove on a balance of probabilities all their allegations against the third defendant. Not an iota of evidence has been adduced to establish the plaintiffs' allegations and claims against the third defendant. The third defendant had acted within the law and diligently carried out her duties as the company secretary of the fourth defendant company. The third defendant owes no legal duty towards the plaintiffs.

[93] Recently, our Court of Appeal in the case of *Rahaz Sdn Bhd v Fasten Group Ltd & Ors and other appeals* [2010] 1 MLJ 69; [2009] 6 AMR 516 had decided that beneficial interest in shares cannot be taken into account and beneficiary of shares had no rights in a company. At p 82 (MLJ); 527 (AMR) it was decided that:

On the facts of this case, by *Rahaz's* own admission in their statement of claim, they are not a registered shareholder of Merbok, but only a beneficial owner of the 29,250,000 shares registered in the name of the specified nominees. *Rahaz's* argument was that 'shareholder' must be construed to include a party who had pledged their shares. The judge however held that such beneficial ownership cannot be taken into account. We agree. A beneficiary of shares, registered in the name of another as trustee, had no rights in such company. This conclusion is fortified by article 6 of the Merbok's memorandum and articles which states:

No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entity thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of court.

A If any of the party to the Shareholders Agreement no longer holds any ordinary shares in Merbok, that shareholder can no longer enforce the Agreement as the said Agreement would no longer have any effect vis-a-vis the said former shareholder.

B [94] On the basis of the previously mentioned proposition of law, it is my judgment that the plaintiff does not have any cause of action against the second defendant as a beneficial shareholder.

C [95] It is an undisputed fact that the nominees of ADSB had purchased 70% shares in the second defendant from the first defendant and his wife for valuable consideration and the nominee are now the registered shareholders of the second defendant.

D [96] There is no case filed against ADSB, Zamzuri or Shahir in respect of the 70% shares. The plaintiff in the present case cannot seek any relief for the 70% shares held under the name of Zamzuri and Shahir.

E [97] Further, the 70% shares were purchased from the first defendant and Zuraini who were then the registered shareholders of the 70% shares in the second defendant and a sum of RM980,000 was paid as consideration.

F [98] A shareholder of a company does not have any interest, legal or beneficial over the assets of a company. This is an entrenched principle in company law. This is an entrenched principle in company law. In the case of *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750 the Court of Appeal at p 107 (MLJ); p 762 (CLJ) had decided:

H It has to do with a principle which lies at the heart of company law. It is that a company is a separate person from its shareholders. The latter have no interest, legal or beneficial over the property of the former. As Lord Buckmaster said in *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619:

I Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

[99] In *Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd* [2006] 4 MLJ 189 at p 192 it was held:

It is trite that a company is a separate individual from its shareholders and directors. The property of the company belong to the company, not to the shareholders or directors. These elementary principles were established in the seminal case of *Salomon v Salomon & Co* [1897] AC 22 at p 30. Recently, this court had the occasion to reemphasise this point in *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355 (CA).

[100] In *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355 at p 359 it was held:

The source of the confusion in the minds of the plaintiffs when pursuing their claim against the second to the sixth defendants is their oversight of the fundamental principle that a company is a separate entity distinct from its shareholders. The property owned by a company belongs to it and not to its shareholders.

[101] In our present case, the plaintiff is not even a registered shareholder of the second defendant. Even if the plaintiff is a shareholder, the plaintiff as a shareholder is not entitled to the assets of the second defendant and therefore the plaintiff is not entitled to claim for reliefs (i)(b) and (iv) in the statement of claim which all relates to the assets of the second defendant.

[102] Therefore, to sum it up, based on all these reasons, there was no trust of 20% shares held by the first defendant for the plaintiff. There was also no trust of 30% shares held by PW2 for the plaintiff. Furthermore, the transfer dated 7 December 2004 was valid and binding and that PW2 was paid RM980,000 for those shares. Hence, the whole of the claim by the plaintiff against the first and second defendants is dismissed with costs.

Claims dismissed with costs.

Reported by Kanesh Sundrum

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